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DISTRICT COURT

CLARK COUNTY, NEVADA

TED R. BURKE; MICHAEL R. and LAURETTA L. KEHOE; JOHN BERTOLDO; PAUL BARNARD; EDDY KRAVETZ; JACKIE and FRED KRAVETZ; STEVE FRANKS; PAULA MARIA BARNARD; LEON GOLDEN; C.A. MURFF; GERDA FERN BILLBE; BOB and ROBYN TRESKA; MICHAEL RANDOLPH; and FREDERICK WILLIS, Plaintiffs, vs. LARRY H. HAHN, individually, and as President and Treasurer of Kokoweef, Inc., and former President and Treasurer of Explorations Incorporated of Nevada; HAHN'S WORLD OF SURPLUS, INC., a Nevada corporation; PATRICK C. CLARY, an individual; DOES 1 through 100, inclusive; Defendants, and KOKOWEEF, INC., a Nevada corporation; EXPLORATIONS INCORPORATED OF NEVADA, a dissolved corporation, Nominal Defendants.	CASE NO. A558629 DEPT: XIII **PLAINTIFFS' OPPOSITION TO DEFENDANTS LARRY HAHN AND HAHN'S WORLD OF SURPLUS, INC.'S MOTION TO DISMISS AMENDED VERIFIED COMPLAINT**

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Plaintiffs Ted R. Burke; Michael R. And Lauretta L. Kehoe; John Bertoldo; Paul Barnard; Eddy Kravetz; Jackie and Fred Kravetz; Steven Franks; Paula Maria Barnard; Leon Golden; C.A. Murff; Gerda Fern Billbe; Bob and Robyn Treska; Michael Randolph and Frederick Willis (hereinafter collectively referred to as "Plaintiffs"), by and through their undersigned counsel of record, Robertson & Vick LLP, hereby files their Opposition to Defendants Larry Hahn and Hahn's World of Surplus, Inc.'s Motion to Dismiss Amended Verified Derivative Complaint, and the joinder of Defendant Patrick C. Clary and nominal Defendant Kokoweef, Inc. thereto. Further, Plaintiffs hereby file this counter-motion to have the Joinder of nominal Defendant Kokoweef stricken.

This Opposition is based upon the points and authorities set forth herein, the pleadings and papers on file herein, and any oral argument requested of counsel.

DATED this 24th day of November, 2008.

ROBERTSON & VICK, LLP

By: _____
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MEMORANDUM OF POINTS AND AUTHORITIES:

I. INTRODUCTION:

This shareholder derivative action arises out of the defendants' scheme to fraudulently induce shareholders to purchase shares of corporate stock in a gold mine investment scheme

managed by Defendant LARRY HAHN (hereafter "Hahn"), in order for Hahn to finance his personal lifestyles under the guise of conducting a legitimate gold mine operation. This scheme included the sale of unregistered and non-exempt securities in violation of NRS 90.460. Plaintiffs allege that over the past 25 years, Hahn solicited the sale of securities in both Kokoweef, Inc. (hereafter "Kokoweef"), and its predecessor company Explorations Incorporated of Nevada (hereafter "EIN"), to defraud approximately 1,200 investors, including Plaintiffs, through the sale of unregistered securities to finance the construction of a private compound used solely for the personal use of defendants at the mine location.

Plaintiffs seek a variety of relief designed to benefit Kokoweef and the other shareholders, including the appointment of a receiver, issuance of a temporary restraining order, recision and reissuance of the illegally issued stock, for damages, including those done to Kokoweef by Defendants Hahn and Patrick C. Clary (hereafter "Clary"), an accounting, and a variety of relief stemming from the illegal issuance of the stocks.

In requesting the appointment of a receiver, Plaintiffs are seeking the review, by an independent court appointed entity, of all of Kokoweef's and EIN's corporate books and financial records, and the completion of an accounting of all sums being collected and expended by Kokoweef, and previously by EIN, to determine the extent of corporate waste by Defendants Hahn and Clary, and the amount that Defendants Hahn and Hahn's World of Surplus (hereafter "HWS") may have been unjustly enriched. Additionally, Plaintiffs seek a receiver to finally identify all the existing shareholders, to rescind the illegally issued stock (whether original EIN or Kokoweef stock), to legally reissue all stock, and to, finally, have Kokoweef in compliance with its own bylaws, and all Nevada state and federal statutes and regulations.

In seeking injunctive relief, Plaintiffs hope to stay a battery of improper and damaging conduct by Defendants Hahn, HWN and Clary, including:

(1) Defendants' refusal to conduct the affairs of Kokoweef in accordance with the Bylaws and Nevada law concerning the governance of a corporation;

(2) Defendants' violations of state and federal securities laws by issuing corporate stock without registration, exemption and without proper records;

(3) Defendants' refusal to conduct a formal audit by a CPA or maintain accounting records in accordance with generally accepted accounting practices;

(4) Defendants' failure to notify shareholders of their potential tax liability for the issuance of corporate stock by Defendants in exchange for alleged services rendered by certain shareholders, without payment of any legitimate consideration;

(5) Defendants' failure to give proper notice of shareholder and board of director meetings;

(6) Defendant Hahn's *ultra vires* actions in unilaterally removing Board members, and appointing replacement Board members, at his sole discretion, depending upon whether they support his misconduct or not;

(7) Defendant Hahn's improper use of corporate assets to pay for his defense of this shareholder derivative lawsuit, which constitutes further unauthorized use of corporate assets for his personal financial benefit; and

(8) Defendant Hahn's forgery of Plaintiff Burke's signature on a set of Bylaws for the corporation.

Through these actions, Defendants continue to damage Kokoweef and the Plaintiffs, as well as all of the approximately 1,200 shareholders in Kokoweef. Plaintiffs' First Amended Complaint (hereafter the "FAC", a true and correct copy of which is attached hereto as Exhibit 1) was filed for the purpose of halting the ongoing damage to Kokoweef and its approximately 1,200 shareholders.

II.

STATEMENT OF FACTS

This is a shareholder derivative lawsuit against Defendant Hahn, Kokoweef's president, and his alter-ego, HWS. This shareholder derivative suit seeks damages owed to the corporation as a result of, among other acts of malfeasance, self-dealing, securities fraud, and conversion of corporate assets by the Defendants. Plaintiffs, all shareholders and/or directors of Kokoweef, purchased shares of corporate stock in a gold mine investment managed by Hahn. The mine is located approximately eleven miles south of state line in San Bernardino County, California. Over the past twenty-five (25) years, Defendant Hahn has solicited and sold investments in this gold mine to more than twelve hundred (1,200) investors throughout the country, although he

cannot produce records of the names, addresses or amount of consideration, if any, paid by all of these investors.

EIN was incorporated on October 24, 1984, for the purpose of exploration and continuing the search for gold in underground caverns. During EIN's corporate existence, Hahn issued an undetermined number of shares to literally hundreds of investors in the gold mine for a sale price of $6 per share. The issuance of these shares of stock in EIN violated both federal and state securities laws, as more fully alleged in the FAC on file herein.

Following is a description of the facts pled in the FAC. As will be seen, Plaintiffs have pled the FAC with sufficient specificity to warrant denial of Defendants' Motion to Dismiss.

Defendant Clary was the corporate counsel to EIN, and at all times relevant herein, was and is the corporate counsel to Kokoweef. As alleged more fully in the FAC, recognizing that EIN and Hahn had violated both federal and state securities laws by issuing non-exempt shares in EIN, Defendants Hahn and Clary devised a scheme to conceal these illegal transactions from the shareholders by "reorganizing" EIN into a new corporation, called Kokoweef.

On or about November 10, 2005, EIN entered into an "Agreement and Plan of Reorganization" with Kokoweef, whereby EIN agreed to sell and assign to Kokoweef all of EIN's assets and Kokoweef agreed to assume all of the liabilities of EIN, ***"excepting liability to the Old Company's [EIN] stockholders"***, in exchange for voting shares of Kokoweef's common stock. Kokoweef was incorporated by Defendant Hahn on or about May 25, 2004. Defendant Clary acted as both corporate counsel for EIN and the surviving corporation, Kokoweef.

On or about October 12, 2006, Defendant Clary sent a written notice to the stockholders of EIN informing them that he was corporate counsel to both EIN and Kokoweef, and that on November 10, 2005, EIN and Kokoweef entered into an "Agreement and Plan of Reorganization", whereby EIN agreed to sell and assign to Kokoweef all of EIN's assets in exchange for the voting shares of Kokoweef's common stock. Defendant Clary's letter instructed each stockholder of EIN to return his or her stock certificates to Kokoweef in exchange for a new Kokoweef stock certificate.

As alleged at paragraph 13 of the FAC, Defendants Clary and Hahn devised the scheme to "reorganize" EIN into Kokoweef in an attempt to conceal from the shareholders the fact that 99% of EIN's stock sales were illegal. Further Defendant Clary has admitted that he wrote the Agreement and Plan of Reorganization in such a way to avoid Kokoweef's liability to its unsuspecting shareholders for these securities violations and in violation of NRS 90.460.

Plaintiffs allege that Defendants failed to keep records of the identities of the approximately 1,200 investors in EIN and Kokoweef, the amount of consideration paid by each investor for their stock, and the number of shares issued by Defendants to each investor. Further, Plaintiffs allege that Defendants failed to maintain financial statements and follow generally accepted accounting principals for either EIN and Kokoweef.

Plaintiffs further allege that over the past twenty-five (25) years, Defendant Hahn solicited the sale of securities in EIN and Kokoweef as part of a scheme to defraud Plaintiffs and other investors, whereby Defendants used the sale of unregistered securities to finance the construction of a private compound used solely for the personal use of Defendant Hahn at the mine location. Plaintiffs are also informed and believe that in furtherance of the scheme to defraud the Plaintiffs and other investors, Hahn prohibited any unannounced visits to the mine site and would only allow access to the mine on special occasions. During these approved visits, Defendants would give a tour of the mine, mining equipment and promote the progress of the mining operation, although in fact no serious mining operations were regularly conducted by the Defendants. Plaintiffs allege that Hahn used the proceeds of the sale of unregistered securities to finance his own lifestyle, construction of his compound and his living expenses and not in furtherance of a commercial mining operation to the financial detriment of the shareholders.

On or about September 16, 2006, an assayer retained by EIN presented Defendant Hahn with an analytical report, which indicated the presence of gold and silver and other valuable mineral at depth in the mine. In the Spring of 2007, the President of Mayan Gold, Inc. met with Defendant Hahn and Plaintiff Ted R. Burke (hereafter "Burke") regarding a proposal to pay to Hahn the sum of Four Million Dollars ($4,000,000.00) in investment capital to mine gold, silver and other valuable minerals at the mine in a joint venture with Kokoweef. At this meeting, the

President of Mayan Gold, Inc. made a standard request to review the books and financial records of Kokoweef as part of his due diligence investigation. In response to this request, Defendant Hahn abruptly terminated the meeting and rejected Mayan Gold's $4 million investment offer, to the financial detriment of the shareholders. This was the first and only real deal that has been brought to Kokoweef, and Defendant Hahn rejected it out of hand when asked to look at Kokoweef's financial records. This offer from Mayan Gold would have brought real and true value to Kokoweef, and would have allowed Hahn's shareholders to realize some gain on their investment. However, Plaintiffs believe that the extent of Defendants' Hahn and HWS' corporate waste is so great that Hahn would rather reject a good investment offer than risk being exposed. A true and correct copy of the offer from Mayan Gold is attached hereto as Exhibit 2.

On or about June of 2007, Plaintiff Burke and several other shareholders discovered the existence of the Bylaws of Kokoweef, and upon reviewing those Bylaws, had reason to suspect that Kokoweef's business practices were in conflict with the Bylaws. Plaintiff Burke asked Defendant Hahn whether an annual audit of Kokoweef's financial records had ever been performed. Defendant Hahn informed Burke that no such audit had ever been performed and refused to make Kokoweef's books and financial records available to Burke, despite the fact that Burke was a Director and Secretary of Kokoweef at the time. Burke was not alone in requesting that an audit of Kokoweef's financial records be performed. Attached hereto as Exhibit "3" are affidavits from several stockholders, outside of the named Plaintiffs, requesting an inspection of the books and records. Plaintiffs believe that while Defendants have produced some of the books and records for purposes of this litigation, that the documents necessary for a full audit, as required in the Bylaws, have still not been produced.

Burke then informed Hahn that he was going to request a board meeting to address his concerns and to request a formal audit be conducted of Kokoweef's books. Burke also discussed his request for an audit with Defendant Clary, who informed Burke that the board meeting could be held on August 28, 2007, at Clary's office.

Upon learning that BURKE had requested a meeting of the board of directors of Kokoweef to be scheduled on August 28, 2007, Hahn then noticed a "Special Meeting" of all

shareholders to be held that same date to vote on new Board members. Defendant Hahn failed to give proper notice of the "Special Meeting" pursuant to the Bylaws. Hahn noticed the location for this "Shareholder Meeting" to be held at the mine location, which was approximately seventy (70) miles from the location of the Board meeting in Las Vegas making it impossible to attend both meetings. As a result, the Board meeting was never held, and Burke and other Plaintiffs instead attended the shareholder meeting on August 28, 2007.

At the shareholder meeting, Hahn nominated five (5) individuals for the Board of Directors without any prior notice to the shareholders or the existing Board of Directors, again in violation of the Bylaws. Hahn also announced at the shareholder meeting that he would consent to an audit of Kokoweef's books and financial records. However, the subsequent audit was only performed on the financial records of Kokoweef for a period of the preceding eight (8) months and no review of the financial records of the predecessor entity, EIN, was allowed by Hahn..

On or about September 18, 2007, Burke was invited to attend a meeting with Defendants Hahn and Clary. At that meeting, Burke asked Defendant Clary what his personal liability was as a Director of Kokoweef for what Burke perceived to be Kokoweef's violation of the Bylaws and for what he believed to be Hahn's misappropriation of corporate funds to pay for his personal expenses. At this meeting, Defendant Clary informed Burke that the reason Kokoweef was formed was an attempt to "clean up" the multiple securities violations of EIN. Defendant Clary further informed Burke that ninety-nine percent (99%) of EIN's stock sales by Defendant Hahn were unlawful. When BURKE stated his intent to report these unlawful activities to the Securities and Exchange Commission ("SEC"), Defendant Clary told Burke going to the SEC was "insane", that the SEC was "the big bad wolf", that the SEC were " assholes", and that "they destroy companies and they destroy people." Further, Defendant Clary told BURKE, "I just don't want you to do anything stupid, I mean, the idea of going to talk to the SEC is about as insane as anything you could personally do. I mean, if you want to just stick a knife in yourself, it'd be a shorter way to solve the problem."

Defendant Clary further advised Burke that although 99% of the securities transactions had probably not been conducted lawfully, that the impropriety was irrelevant because the statute

of limitations had run. However, Defendant Clary did not tell BURKE that Defendants Hahn had issued approximately 1,057,565 shares of unregistered securities in KOKOWEEF during 2007 to approximately 580 investors at a price of $6 per share, violating NRS 90.460. The statute of limitations for such violation is two (2) years from the date the violation was discovered, or should have been discovered by the exercise of reasonable diligence. NRS 90.670. Thus, the applicable statute of limitations has not run, contrary to Defendant Clary's misrepresentation to Plaintiff BURKE.

Defendant Hahn admitted to BURKE at this meeting that he had concocted the scheme to "reorganize" EIN to exchange EIN's shares for Kokoweef shares in order to conceal the illegality of the sale of EIN securities and to conceal these illegal transactions from the shareholders until, he hoped, the statute of limitations lapsed before the shareholders discovered this securities fraud.

During the September 18, 2007 meeting, Burke asked Defendant Clary the direct question, "You are general counsel for Kokoweef, Inc., right?" Mr. Clary responded that in fact he was general counsel for the corporation, and was not acting as general counsel for Defendant Hahn. However, at that same meeting, Burke expressed his concerns over improprieties in the issuance of securities for EIN and Kokoweef, as well as the corporation's failure to maintain adequate financial records and comply with the Bylaws. In response, Clary stated that if something went wrong he would correct it or "make it go away." Also, during this meeting, Defendant Clary informed BURKE that the issuance of 70,000 shares of stock in Kokoweef to Burke was illegal, and created a tax liability for Burke and all other shareholders who had been given shares of stock in exchange for alleged services contributed to the corporation. Defendant Clary stated that he would inform all of the shareholders that they needed to file amended tax returns, but the Plaintiffs are informed and believe, and thereon allege, that as of the date of filing this action, Defendant Clary has failed to give notice to the shareholders of this tax liability.

The facts set forth above were inadvertently recorded during the September 2007 meeting and transcribed. The First Amended Complaint is based, in part, upon the events of that meeting, and the same allegations would have been set out regardless of the existence of the transcript.

Defendants, including Defendant Clary, have all questioned the admissibility and veracity of the transcript of this meeting. However, Defendant Clary who was present at that meeting, has also admitted that the substance of his "utterances" were, indeed, accurate.[1] As such, any further repudiation of the content of the transcript, as set forth in the First Amended Complaint should be disregarded.

Plaintiffs further allege that commencing in 2003 to the present, Defendant Hahn has written checks from the Kokoweef and EIN bank accounts to himself and his separately owned company, HWS for personal use. Defendant Hahn has wasted corporate assets and converted corporate assets for his own personal benefit and use, thereby breaching his fiduciary duty owed to the Plaintiffs as a director. See Affidavit of Plaintiff Michael R. Kehoe (hereafter "Kehoe") shareholder and director of KOKOWEEF, attached hereto as Exhibit 5. Mr. Kehoe's Affidavit details his review of Kokoweef's financial records, and sets forth specific examples of Defendants' mismanagement of Kokoweef. These examples include evidence that Hahn wrote corporate checks to family members and personal friends for their personal use, including food, pet food and care, and other supplies, that corporate checks were written to pay back personal loans of Hahn, that Hahn wrote checks as loans that were never repaid, that money was taken for sales of shares with no concomitant record of the deposit of those sums, that company funds were improperly used for construction of improvements to residences at the camp site, that cash advances were taken on Kokoweef credit cards with no back-up invoices, and that Hahn wrote checks to various vendors for his own benefit, including his own dental work.

Defendants will undoubtedly argue that this litigation was filed by a few disgruntled shareholders. However, the reality is that this litigation will benefit all the shareholders, because the corporate defalcation continues, with new and egregious examples. ***Most recently, a***

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[1] Defendant Hahn's admission is contained in correspondence sent to the State Bar of Nevada, a true and correct copy of which is attached hereto as Exhibit 4. Hahn's correspondence responded to a Complaint by Plaintiff Burke that Defendant Hahn had a conflict of interest in representing Kokoweef and that he should withdraw as counsel of record. In responding to this Complaint, Hahn admitted to the substance of the transcript and wrote: "Nevertheless, I stand by the substance of the utterances that actually said." Having admitted that the substance of these conversations occurred, Defendant Hahn, and the other Defendants cannot now deny that the conversations, as set forth in the First Amended Complaint occurred.

newsletter was sent out by Defendant Hahn soliciting funds for the defense of the litigation!!

A true and correct copy of this newsletter is attached hereto as Exhibit 6. The Affidavit of Ted Burke authenticating this newsletter is attached hereto as Exhibit 7. Ample case authority would support the imposition of a Temporary Restraining Order, Preliminary Injunction and appointment of a Receiver based solely on this newsletter. Sobba v. Elmen, 462 F. Supp. 2d 944, 950 (E.D. Ark. 2006) ("Allowing the nominal [corporate] defendants to defend on the merits in effect would allow the [individual defendants] to shift the cost of his defense of the derivative suit to the corporation against which he has allegedly committed tortious conduct...[The individual defendant's] using his control of the nominal defendants to get them to defend on the merits would shift the cost of his defense to the corporation even if [the shareholder plaintiff's] claims are proven."); See also Rowen v. Le Mars Mut. Ins. Co. of Iowa, 282 N.W. 2d 639, 645 (Iowa 1979); Meyers v. Smith, 251 N.W. 20-21 (Minn. 1933).

During the September 18, 2007 meeting, Defendant Clary also advised BURKE that the sales of securities in EIN and Kokoweef did not need to be registered with the SEC, because they fell within an exemption provided by Rule 504 of Regulation D. However, Plaintiffs believe that the sale of securities in EIN and KOKOWEEF were not eligible for the exemption provided by Rule 504 of Regulation D of the SEC because neither EIN nor Kokoweef registered the offering of shares with the State of Nevada, nor filed a Registration Statement with the State of Nevada nor delivered substantive disclosure documents as required to investors such as Plaintiffs. Further, neither EIN nor KOKOWEEF filed a Form D after they first sold their securities, which is a requirement under Rule 504 of Regulation D. Additionally, Defendant Clary advised Burke that the sale of securities of EIN and Kokoweef were also exempt under Nevada securities laws. However, Plaintiffs are informed and believe, and thereon allege, that these representations were also false in that none of the transactions complied with the exemptions provided by NRS §90.520 or NRS §90.530.

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III. LEGAL AUTHORITY:

A. STANDARD ON MOTIONS TO DISMISS:

The standards and interpretations for Motions to Dismiss pursuant to NRCP 12(b)(5) are fairly well established. Defendants cite to two cases which state the general law governing a determination on its request that this Court dismiss Plaintiffs' First Amended Complaint outright prior to the commencement of any discovery or the procurement of further evidence. However, Plaintiffs exceed the standards set out in Defendants' Motion, and therefore, Defendants Motion must be denied.

A ruling granting such a Motion is "subject to a rigorous standard of review on appeal." Buzz Stew, LLC v. City of North Las Vegas, ___ Nev. ___, 181 P.3d 670, 672 (Nev. 2008). Accordingly, the Court must recognize all factual allegations in the FAC as true and draw all inferences in favor of Plaintiffs, and the FAC dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle Plaintiffs to relief. Id. Additionally, Defendants cite Hampe v. Foote, 118 Nev. 405, 408 (2002) for the proposition that its Motion is proper if the allegations in the FAC are insufficient to establish the elements of a claim for relief. In this case, reviewing the FAC through the lens of this language, Defendants' Motion to Dismiss must be denied because the FAC sets forth allegations that sufficiently establish the elements for each Cause of Action, and sets forth facts, which, clearly, if true, entitle Plaintiffs to relief.

Defendants attempt to bootstrap onto these standards, this Court's finding regarding Plaintiffs' bond requirement, following Defendants' demand pursuant to NRS 41.520. However, the language in NRS 41.520, "no reasonable possibility" does not represent the same standard as the language in the Buzz Stew case, which states that a complaint should be dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true would entitle it to relief. Buzz Stew, LLC v. City of North Las Vegas, ___Nev. ___, 2008 WL 1747877 (2008). Additionally, Defendants simply throw this argument in with no legal authority or support. Accordingly, the Court may, and should, disregard this novel legal proposition. See Quillen v. State, 112 Nev. 1369, 1380 (1996); Citti v. State, 107 Nev. 89, 91 (1991); Tahoe Village Realty v. DeSmet, 95 Nev. 131 (1979) (overruled on other grounds). Additionally, as was raised at the

evidentiary hearing, Defendants have and continue to withhold and hide documents necessary to complete a proper accounting of EIN and Kokoweef's financial records.

B. PLAINTIFFS' MEET THE REQUIREMENTS FOR A DERIVATIVE ACTION:

Defendants argue that Plaintiffs fail to meet the requirements for a derivative action, as provided by NRCP 23.1. However, Defendants' assertions regarding Plaintiffs' FA C in relation to NRCP 23.1 includes unsupported, novel legal arguments, and inapplicable analysis, and therefore, should be denied. As discussed below, Plaintiffs sufficiently meet the requirements for a derivative action, and therefore, Defendants' Motion must be denied.

1. Plaintiffs Fairly and Adequately Represent the Interests of the Shareholders:

Defendants first argue that Plaintiffs do not fairly and adequately represent the interests of the remaining Kokoweef shareholders. The two flawed bases in the Motion for this claim are that: 1) Plaintiffs do not represent a sufficient number of shares and shareholders; and 2) Plaintiffs interests are different than the majority of Kokoweef shareholders and their claim for relief, allegedly, is only for their own benefit. Both of these arguments lack factual and legal support, and therefore, must fail.

First, moving Defendants make the ridiculous argument that Plaintiffs do not mathematically represent a sufficient number of issued shares of the corporation to maintain this action. Defendants cite no authority for this non-existent criteria, and such a technical requirement is not found in NRCP 23.1 or in NRS 41.520. In fact, defendants admit: "This aspect of NRCP 23.1 has not been addressed by the Supreme Court of Nevada." Mot. 6:25.

EDCR 2.20(e) requires that a memorandum of points and authorities contain more than bare citations to statutes, rules of case authority, or the court may decline to consider it. Additionally, the Nevada Supreme Court has repeatedly ruled that the court may disregard novel legal arguments, which are unsupported by legal authority. See Quillen v. State, 112 Nev. 1369, 1380 (1996); Citti v. State, 107 Nev. 89, 91 (1991); Tahoe Village Realty v. DeSmet, 95 Nev. 131 (1979) (overruled on other grounds). Without a shred of legal authority, Defendants' contention that Plaintiffs do not own a significantly significant portion of Kokoweef stock to

"fairly and adequately" represent the interests of the remaining shareholders should be disregarded.

Notwithstanding Defendants' lack of legal authority for this claim, Larson v. Dumke, 900 F.2d 1363 (9th Cir. 1990), the very case Defendants rely upon later in the Motion to argue that Plaintiffs interests are different than the majority of the shareholders, provides contrary authority. In Larson, the court stated: "[W]e are persuaded that a single shareholder may bring a derivative suit". Id. at 1368 (citing Lewis v. Curtis, 671 F.2d 779, 788-89 (3d Cir. 1982) (holding that one plaintiff who owned 100 shares in a corporation with nearly 8 million shares outstanding was considered an adequate representative under Rule 23.1) (distinguished on other grounds)).

Defendants next claim that Plaintiffs do not fairly and adequately represent the interests of the shareholders because, among other perceived deficiencies, Plaintiffs' interests are "different than the majority of the shareholders of KOKOWEEF." Mot. 7:12-14. The basis for this claim is the prayer for relief pled by Plaintiffs and a list of factors set forth in Larson v. Dumke, 900 F. 2d 1363, 1367 (9th Cir. 1990), which Defendants claim describe the standards by which a court should determines if Plaintiffs fairly and adequately represent the interests of the shareholders.

> An adequate representative must have the capacity to vigorously and conscientiously prosecute a derivative suit and be free from economic interests that are antagonistic to the interests of the class. Other courts have stated certain factors to determine adequacy of representation: "(1) indications that the plaintiff is not the true party in interest; (2) the plaintiff's unfamiliarity with the litigation and unwillingness to learn about the suit; (3) the degree of control exercised by the attorneys over the litigation; (4) the degree of support received by the plaintiff from other shareholders; (5) the lack of any personal commitment to the action on the part of the representative plaintiff; (6) the remedy sought by plaintiff in the derivative action; (7) the relative magnitude of plainiff's personal interests as compared to his interest in the derivative action itself; and (8) plaintiff's vindictiveness toward the defendants. These factors are "intertwined or interrelated, and its frequently a combination of factors which leads a court to conclude that the plaintiff does not fulfill the requirements of 23.1".

(Citations omitted). However, despite citing to this case, Defendants provide no analysis of these factors, and simply assert that Plaintiffs do not meet them. In fact, pursuant to Larson, Plaintiffs more than fairly and adequately represent the interests of the shareholders. NRCP 23.1.

First, in regard to Defendants' argument that Plaintiffs' interests are different than the other Kokoweef shareholders, Defendants fail to appreciate that no direct cause of action has been alleged by the Plaintiffs against the corporation. Plaintiffs have prayed for rescission, because the Defendants illegally issued Kokoweef stock to ALL shareholders, not just the Plaintiffs. This request is not to simply obtain damages for the individual Plaintiffs, but to provide a benefit to Kokoweef and all its shareholders. Rescinding the illegal stock, and re-issuing it to all of Kokoweef's shareholders will benefit the corporation and all of the shareholders. A rescission and legal re-issuance of the stock to all shareholders will clean up the past securities fraud upon all shareholders and mitigate against potential criminal and civil penalties, as well as potential third party claims for monetary damages by the shareholders.

Plaintiffs have also sought, among other requests for relief, the appointment of a receiver, a complete accounting, injunctive relief, and an accounting. As detailed above, the appointment of a receiver will allow a determination on the extent of corporate waste, beyond that already detailed in the affidavit of Plaintiff Michael Kehoe. See Exhibit 5. All these remedies serve to benefit the corporation and all of its shareholders by ensuring that Kokoweef's assets are protected, that its board is properly maintaining its fiduciary duties to the shareholders, and that its transactions comply with Nevada's state laws and all corporate by-laws. Defendants have simply not set forth any facts or legal authority that demonstrate Plaintiffs have "economic interests that are antagonistic" to the remaining Kokoweef shareholders.

Plaintiffs also meet many of the other factors set forth in Larson. The facts underlying Plaintiffs' Complaint began in June 2007, when Plaintiff Burke discovered that Defendant Hahn was not complying with corporate by-laws, including the completion of a financial audit. FAC ¶ 10. See Affidavit of Burke detailing Defendants' violation of Kokoweef's own Bylaws, a true and correct copy of which is attached hereto as Exhibit 8. Plaintiffs also discovered that Defendant Hahn was using corporate funds for his personal financial obligations. FAC ¶17. Finally, Plaintiffs discovered that Kokoweef's shares had been illegally issued. FAC ¶ 14-15. Curing any and all of these offending and illegal behaviors by Defendants remains the primary goal of Plaintiffs so that Kokoweef is operated legally, and with the duty of care and loyalty

owed to all shareholders. Therefore, the true party in interest, regardless of Defendants' interpretation of the pleadings is Kokoweef.

Larson also looks to the degree of support received by the plaintiff from other shareholders. Id. at 1367. Plaintiffs have received a large amount of support from other shareholders. Attached hereto as Exhibit 3 are copies of affidavits from other shareholders supporting Plaintiffs' request for an audit of Kokoweef's financial records. Attached hereto as Exhibit 9 are copies of emails received from numerous shareholders setting forth their support for the Plaintiffs' actions. This documentation demonstrates that this is not simply an action by rogue shareholders, but that it stems from the concerns of many shareholders.

Other Larson factors examine components of the Plaintiffs' vigorous and conscientious prosecution of the derivative suit. These include the Plaintiffs' familiarity with the litigation and willingness to learn about the suit, the degree of control of the Plaintiffs, the personal commitment of the Plaintiffs to this action. Id. at 1367. By any measure, the Plaintiffs will fairly and adequately represent the class under these factors. As has been demonstrated throughout this litigation, the Plaintiffs, have vigorously and conscientiously prosecuted this action. They have taken time off work and traveled from out of state to attend the majority of the hearings. They have provided numerous affidavits in support of endless law and motion work. They have kept in regular contact with non-Plaintiff shareholders to apprise them of the status of the litigation. See Exhibit 9.

Defendants further claim that Plaintiffs' prayer for relief and manner of pleading indicates that the Plaintiffs are not acting for the benefit of the corporation. As has been described above, this is simply not the case, and Defendants have provided no legal authority in support of this claim. Instead, Plaintiffs have properly pled their requests for relief and properly named Kokoweef as a nominal defendant, even though the fruits of the litigation will be for the benefit of Kokoweef. In a derivative suit, any recovery the suing shareholder obtains goes to the corporation because, " '[I]n reality the corporation is the plaintiff, the stockholder being only a nominal plaintiff.' " Sobba v. Elmen, 462 F. Supp. 2d 944 (E.D. Ark. 2006). " ' Although the corporation is named in the complaint as a defendant, its interests are not necessarily adverse to

those of the plaintiff since it will be the beneficiary of any recovery.' " Id. at 947 (quoting 13 William Meade Fletcher Et Al., Fletcher Cyclopedia of the Law of Private Corporations § 5997 (perm. ed., rev. vol. 2004)).

Finally, Defendants continued law and motion work, along with the recent solicitation to Kokoweef shareholders to pay for defense of this litigation, demonstrates Defendants continued improper use of corporate assets. Plaintiffs strongly suspect, and the recent newsletter, attached hereto as Exhibit 6 supports that Moving Defendants are using corporate funds to pay for their defense of this derivative action. Such conduct is further evidences damage to the shareholders and to Kokoweef, and is expressly prohibited. Several state high courts, including, recently the California Court of Appeal, have recognized that corporate directors who are defendants in a shareholder derivative suit cannot defend themselves using corporate assets.

In Patrick v. Alacer, ___ Cal. Rptr. 3d ____, 2008 WL 4649138 (Cal. App. 4th Dist. 2008), the California Court of Appeals concluded that "[a]llowing the nominal [corporate] defendants to defend on the merits in effect would allow the [individual defendants] to shift the cost of his defense of the derivative suit to the corporation against which he has allegedly committed tortious conduct. . . . [The individual defendant's] using his control of the nominal defendants to get them to defend on the merits would shift the cost of his defense to the corporation even if [the shareholder plaintiff's] claims are proven." Sobba v. Elmen, 462 F. Supp. 2d 944, 950 (E.D. Ark. 2006); See also Rowen v. Le Mars Mut. Ins. Co., 282 N.W. 2d 639, 645 (Iowa 1979); Meyers v. Smith, 251 N.W. 20, 20-21 (Minn. 1933). Based upon this line of cases, Defendants cannot shift the cost of defending themselves in this derivative action onto the corporation, thus further misusing their control of Kokoweef and damaging the corporation and its shareholders.

2. Plaintiffs Have Sufficiently Pled the Demand Futility Preceding Their Initial Complaint

"The management [of a corporation] owes to the stockholders a duty to take proper steps to enforce all claims which the corporation may have. When it fails to perform this duty, the stockholders have a right to do so." Patrick v. Alacer, ___ Cal. Rptr. 3d ___, 2008 WL 4649138

(Cal. App. 4 Dist.) (quoting Jones v. H.F. Ahmanson & Co., 1 Cal. 39 93, 107 (Ca. 1969). The FAC sets out detailed allegations regarding the failure of Kokoweef and its controlling stockholder, director and officer, Hahn, to enforce the rights and claims of Kokoweef, all to the detriment of Kokoweef's shareholders. Further, the FAC sets forth particularized facts sufficient to meet the requirements of Shoen v. SAC Holding Corporation, 122 Nev. 621, 137 P.3d 1171 (2006).

"When pleading demand refusal or futility in a derivative action, a shareholder is not required to plead evidence. . . . " Shoen, 137 P.3d at 1180. As alleged in the FAC, Defendant Hahn, both as an officer and a director of Kokoweef, used corporate assets for the "construction of a private compound used solely for his personal use at the mine compound". FAC ¶ 7. Defendant Hahn's virtual dictatorship over the affairs of Kokoweef made any demand for action by the shareholders futile, but also heightened Hahn's duty to give Kokoweef loyal and faithful service. Rowen v. LeMars Mut. Ins. Co., 282 N.W. 2d 639, 649 (Iowa 1979).

Nonetheless, while Defendants' Motion misstates the allegations in the FAC regarding the Demand Excused Allegations at Paragraphs 39-42 of the FAC, they then point out the very allegations in the FAC which clearly demonstrate the futility of making a demand upon the Kokoweef board. In their Motion, Defendants point out the following: "If HAHN refused to have a meeting, as alleged in the AMENDED COMPLAINT, this fact could have been alleged to support the futility of consulting the board of directors." Mot. 11:6-8. These facts are alleged at Paragraphs 10-12 of the First Amended Complaint, which states, in their entirety:

> 10. On or about June of 2007, Plaintiff BURKE and several other shareholders discovered the existence of the Bylaws of KOKOWEEF, and upon reviewing those Bylaws, had reason to suspect that KOKOWEEF's business practices were in conflict with the Bylaws. Plaintiff BURKE asked Defendant HAHN whether or not an annual audit of KOKOWEEF's financial records had ever been performed. Defendant HAHN informed BURKE that no such audit have ever been performed and refused to make KOKOWEEF's books and financial records available to BURKE, despite the fact that BURKE was a Director and Secretary of KOKOWEEF.
>
> 11. BURKE then informed HAHN that he was going to request a board meeting to address his concerns and to request a formal audit be conducted of KOKOWEEF's books. BURKE also discussed his request for an audit with Defendant CLARY, who informed BURKE that the board meeting could be held on August 28, 2007, at CLARY's office.

> 12. Upon learning that BURKE had requested a meeting of the board of directors of KOKOWEEF to be scheduled on August 28, 2007, HAHN then noticed a "Special Meeting" of all shareholders to beheld on the same date to vote on new Board members. Defendant HAHN failed to give proper notice of the "Special Meeting" pursuant to the Bylaws. HAHN noticed the location for this "Shareholder Meeting" to be held at the mine location, which was approximately seventy (70) miles from the location of the Board meeting in Las Vegas making it impossible to attend both meetings. As a result, the Board meeting was never held and BURKE and other Plaintiffs attended the shareholder meeting on August 28, 2007. At the shareholder meeting, HAHN nominated five (5) individuals for the Board of Directors without any prior notice to the shareholders or the existing Board of Directors, again in violation of the Bylaws. HAHN also announced at the shareholder meeting that he would consent to an audit of KOKOWEEF's books and financial records. However, the subsequent audit directed by BURKE was only performed on the financial records of KOKOWEEF for a period of the preceding eight (8) months and no review of the financial records of the predecessor entity, EIN, was allowed by HAHN.

These allegations clearly demonstrate a "reasonable doubt that the board can impartially consider a demand." Shoen, 137 P.3d at 1184. Accordingly, Plaintiffs meet the test enunciated in Shoen and cited by Defendants.

Additionally, Paragraph 13-16 of the FAC pleads with specificity the response Burke received on September 18, 2008, when he made a demand upon Hahn as a fellow director and majority shareholder to try and resolve the securities violations reported by corporate counsel, Defendant Clary.

> 13. On or about September 18, 2007, BURKE was invited to attend a meeting with Defendants HAHN and CLARY. At that meeting, BURKE asked Defendant CLARY what his personal liability was as a Director of KOKOWEEF for what BURKE perceived to be KOKOWEEF's violation of the Bylaws and for what he believed to be HAHN's misappropriation of corporate funds to pay for his personal expenses. At this meeting, Defendant CLARY informed BURKE that the reason KOKOWEEF was formed was an attempt to "clean up" the multiple securities violations of EIN. Defendant CLARY further informed BURKE that ninety percent (90%) of EIN's stock sales by Defendant HAHN were unlawful. When BURKE stated his intent to report these unlawful activities to the Securities and Exchange Commission ("SEC"), Defendant CLARY told BURKE going to the SEC was "insane", that the SEC was "the big bad wolf", that the SEC were " assholes", and that "they destroy companies and they destroy people." Further, Defendant CLARY told BURKE, "I just don't want you to do anything stupid, I mean, the idea of going to talk to the SEC is about as insane as

> anything you could personally do. I mean, if you want to just stick a knife in yourself, it'd be a shorter way to solve the problem."
>
> 14. Defendant CLARY further advised BURKE that although "99% probably of the securities transactions weren't conducted lawfully. The statute of limitations has run." However, Defendant CLARY did not tell BURKE that Defendants HAHN and DOES 1 through 50, inclusive, issued approximately 1,057,565 shares of unregistered securities in KOKOWEEF during 2007 to approximately 580 investors at a price of $6 per share, which is well within the applicable statute of limitations provided by NRS §960.670.
>
> 15. Defendant CLARY admitted to BURKE at this meeting that he had concocted the scheme to "reorganize" EIN to exchange EIN's shares for KOKOWEEF shares in order to conceal the illegality of the sale of EIN securities and to conceal these illegal transactions from the shareholders until hopefully the statute of limitations has lapsed before the shareholders discovered this securities fraud.
>
> 16. During the September 18, 2007 meeting, BURKE asked Defendant CLARY the direct question, "You are general counsel for KOKOWEEF, Inc., right?" Mr. CLARY responded that in fact he was general counsel for the corporation and was not acting as general counsel for Defendant HAHN. However, at that same meeting, BURKE expressed his concerns over improprieties in the issuance of securities for EIN and KOKOWEEF, as well as the corporation's failure to maintain adequate financial records and comply with the Bylaws. In response, attorney CLARY stated that if something went wrong he would correct it or "make it go away." Also, during this meeting, Defendant CLARY informed BURKE that the issuance of 70,000 shares of stock in KOKOWEEF to BURKE was illegal and created a tax liability for BURKE and all other shareholders who had been given shares of stock in exchange for alleged services contributed to the corporation. Defendant CLARY stated that he wold inform all of the shareholders that they needed to file amended tax returns, but the Plaintiffs are informed and believe, and thereon allege, that as of the date of filing this action, Defendant CLARY has failed to give notice to the shareholders of this tax liability.

These allegations provide additional specificity that making a demand on the board, controlled by Hahn, would have been futile because the Kokoweef Board would not have been able to impartially consider such a demand. Shoen, 137 P.3d at 1184.

Further, Paragraph 42 of the FAC alone details the futility of a demand upon the Kokoweef Board, due to the amount of control exercised by Hahn.

> 42. As a result of the facts set forth herein, Plaintiffs have not made any demand on the Kokoweef Board of Directors to institute this action against Hahn. Such demand would be a futile and useless

act because the Board is incapable of making an independent and disinterested decision to institute and vigorously prosecute this action for the following reasons:

a. Due to Hahn's positions as President and Treasurer, and holding almost a majority of the shares, he is in a position to and does control the Board, the company and its operations. There are seven board members, two of which are controlled by Hahn. However, a quorum of five is required to hold a board meeting.

b. Hahn will not permit a board meeting to occur unless he institutes it for matters he wants to discuss. This was evident when Burke scheduled a board meeting for August 28, 2007, to discuss an audit and also to request Hahn to step down. Hahn then scheduled a shareholders meeting for that same date to be held 70 miles from the place of the board meeting and it was impossible to attend both meetings.

c. Based on the summary of the September 19, 2007, meeting provided above and the attached Transcript of the meeting among Burke, Hahn, Clary, and other officers, it is obvious Hahn controls Kokoweef, and that he would find ways to obstruct a board meeting regarding the filing of a shareholders' derivative complaint.

Additionally, Defendants illegally removed Burke and Kehoe as directors in retaliation for Burke demanding that the illegal securities fraud be corrected, and after Burke and Kehoe called for an audit of the corporation's financial records. In other words, Defendants wrongfully removed Burke and Kehoe as directors when they requested the Board simply comply with the Bylaws and governing Nevada law. This supports the specific allegations that further demands upon the board of directors to take the corrective action requested by the Plaintiffs would be futile. Based upon the above allegations, it is clear that Plaintiffs pled with specificity the futility of making a demand upon the board of directors pursuant to NRCP 23.1 and Shoen.

C. PLAINTIFFS' CLAIMS ALLEGING SECURITIES FRAUD IS PLEAD PROPERLY, SEEKS APPROPRIATE RELIEF AND SHOULD NOT BE DISMISSED

1. Moving Defendants fail to comprehend the gravamen of the FAC:

Defendants claim that the FAC is confusing because "It is impossible to tell what, where or to whom wrongful action took place." This argument is truly disingenuous. The FAC contains a plethora of facts, dates, and names, and describes in particularity the wrongful conduct of the Defendants. For instance, FAC ¶ 2 delineates the dates and general details of Defendant Hahn's

initial violation of federal and state securities laws. FAC ¶ 3-6 allege the specific details of the securities violations involved in the Agreement and Plan of Reorganization between EIN and Kokoweef. Specifically, Paragraphs 4-6 allege:

> 4. On or about October 12, 2006, Defendant CLARY sent a written notice to the stockholders of EIN informing them that he was corporate counsel to both EIN and KOKOWEEF and that on November 10, 2005, EIN and KOKOWEEF entered into a "Agreement and Plan of Reorganization", whereby EIN agreed to sell and assign to KOKOWEEF all of EIN's assets in exchange for the voting shares of KOKOWEEF's common stock. Defendant CLARY's letter instructed each stockholder of EIN to return his or her stock certificates to KOKOWEEF in exchange for a new KOKOWEEF stock certificate.
>
> 5. Plaintiffs are informed and believe, and thereon allege, that Defendants failed to keep records of the identities of the approximately 1,200 investors in EIN and KOKOWEEF, the amount of consideration paid by each investor for their stock, and the number of shares issued by Defendants to each investor. Further, Plaintiffs are informed and believe, and thereon allege, that Defendants failed to maintain financial statements and follow generally accepted accounting principals for both EIN and KOKOWEEF.
>
> 6. Plaintiffs are further informed and believe, and thereon allege, that the "Plan of Reorganization" between EIN and KOKOWEEF was a scheme concocted by Defendants HAHN and CLARY to conceal from the stockholders the Defendants' sale of unregistered and non-exempt securities in violation of NRS 90.460.

Defendants admit several times in the Motion that moving Defendants are "confused", and do not know whether the reference to injury to "members of the public" is "an assertion of a class action case." What Defendants fail to comprehend is that Plaintiffs, former directors and all current shareholders, have alleged is that Defendants Hahn and Clary have damaged, and continue to damage Kokoweef, and have and continue to put Kokoweef at significant risk of both civil and criminal penalties by committing securities fraud upon all of the Kokoweef shareholders.

Moving parties ignore the obvious point of this derivative action, i.e. to remove Hahn as a director and president, and Clary as corporate counsel so that all of the securities violations can be remedied, and Kokoweef run legally. This will likely require the cancellation of one-hundred percent (100%) of the approximately 1 million shares of outstanding stock, and re-issuance to all the Kokoweef shareholders once all state and federal securities laws have been met. Such an action, through this derivative complaint will benefit the entire corporation and all of the shareholders.

Further, Plaintiffs have made no "direct action" claims against the corporation, only derivative claims. Moving parties again mistakenly assume Plaintiffs seek monetary damages in this action. However, a careful reading of the FAC makes clear that this is a derivative action only. The prayer for recission of the stock purchased by Plaintiff is merely a remedy for the illegal sale of the stock. Plaintiffs desire to keep their ownership interests in the corporation, but want no part of illegally issued securities. The remedy the shareholders seek is for all the illegally issued shares to be rescinded, and then reissued, only after properly registering the stock, or qualifying for an exemption, with both the SEC and State of Nevada.

2. Defendants Completely Misstate the Purpose and Scope of Nrs 90.460, and Ignore Other Provisions Which Provide Plaintiffs with Their Private Right of Action:

Defendants argue, inexplicably, that the FAC must be dismissed because NRS 90.460 does not provide for a private cause of action. However, NRS 90.460 simply states: "It is unlawful for a person to offer to sell or sell any security in this State unless the security is registered or the security or transaction is exempt under this chapter."

Defendants' argument fails utterly because they have completely ignored other provisions of NRS Chapter 90, which expressly allow for a private right of action. Specifically, NRS 90.660 states:

> **Civil liability:**
>
> 1. A person who offers or sells a security in violation of any of the following provisions: . . .
>
> (b) NRS 90.460;
>
> (d) Subsection 2 of NRS 90.570;
>
> is liable to the person purchasing the security. . . .

Clearly, this provision entitles Plaintiffs to bring this private derivative action for violations of both NRS 90.460 and NRS 90.570. Therefore, Defendants' request for dismissal on this ground should be disregarded.

3. Plaintiffs' Claims Are Plead with Adequate Specificity:

Defendants assert that a complaint stemming from violations of NRS 90.570 must be pled with specificity, as in other fraud claims, and that Plaintiffs have failed to so plead. In reliance of

this argument, Defendants cite G.K. Las Vegas Ltd. Partnership v. Simon Property Group, Inc., 460 F. Supp. 2d (D. Nev. 2006). However, pursuant to G.K. Las Vegas, Plaintiffs have pled allegations related to the violation of NRS 90.570 with sufficient specificity. G.K. Las Vegas, at 1257, citing to FRCP 9(b), states that while:

> " in all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity." The circumstances constituting the alleged fraud must be "specific enough to give defendants notice of the particular misconduct." Vess v. Ciba-Geigy Corp., 317 F. 3d 1097, 1106 (9th Cir. 2003). Therefore, the allegations of fraud must be accompanied by the "who, what, when, where, and how of the misconduct charged." Id. Courts must strike a balance between providing adequate notice to the adverse party while at the same time not effectively requiring pre-discovery. In re Silicon Graphics, Inc. Sec. Litig., 183 F.3d 970, 999 (9th Cir. 1999).

Plaintiffs' FAC more than meets this requirement through the detailed description of the securities violations committed by Hahn in the original sale of EIN shares, and by Hahn and Clary in the creation of Kokoweef. See, e.g., FAC ¶ 13-16. Additionally, the FAC provides adequate notice to the adverse party of the misconduct, and the transactions which Plaintiffs allege constitute the illegal issuance of securities. Therefore, pursuant to G.K. Las Vegas, Plaintiffs have set forth sufficient specificity, and Defendants' Motion must be denied.

Further, many of these allegations have already been admitted by Defendant Clary. As admitted by Clary in the transcript of the September 18, 2007 meeting described in FAC ¶ 13-16, and attached to the original Complaint, the reorganization of EIN into Kokoweef was done expressly to cover up the illegal issuance of "99%" of the corporation's stock, and was not an "internal corporate management decision which only incidentally involved an exchange of shares" as claimed by Defendants. Further, Clary stated at this meeting, and as later transcribed, that he drafted the agreement with the shareholders in such a way as to cut off liability to the shareholders for the Defendants' illegal activities. See FAC ¶15.

As noted above, Defendants have been critical of the transcript of the September 18, 2007 hearing, claiming it is not admissible or credible. However, Defendant Clary has also admitted that the substance of his utterances are accurate, and, thus, Defendants should not be able to deny the facts set out in this transcript and supporting the FAC. See Exhibit 4.

4. Purchases and Sales of Securities Occurred in Violation of Nrs 90.570, And, as Such, Plaintiffs May Maintain Their Claims:

Moving Defendants also argue that the FAC contains no allegation that a purchase or sale of a security occurred, because a a corporate reorganization does not constitute a sale of a security. This argument is utterly specious. Moving Defendants admit that no Nevada case addresses this issue, and cite to one non-Nevada case to bolster this argument. However, the very case Defendants cite, Gelles v. TDA Industries, Inc., 44 F. 3d 102 (2d Cir. 1994), supports the Plaintiffs' allegation that a sale of a security indeed occurred.

Defendants claim that pursuant to Gelles , the "reorganization" and exchange of the illegally issued EIN stocks for Kokoweef stocks, as pled in FAC ¶ 13-16, merely constitute an "internal corporate management decision which on ly incidentally involves an exchange of shares." Mot. 14:23-25. However, the facts of this case, and the illegal sale of securities claimed in this matter are significantly different than the facts of Gelles. In Gelles, the corporation exchanged legally issued stock shares. In this case, there was a major corporate restructuring of EIN, not to take the company private, increase the equity of one shareholder, or assume additional debt, as in Gelles.

Instead, EIN's major corporate restructuring was done because Hahn and Clary were trying to conceal the fraud alleged in the FAC ¶ 13-16, and to remedy the securities violations without alerting the shareholders, and without allowing them any type of civil redress. Defendants Hahn and Clary knew that the EIN shares, and the subsequently issued Kokoweef shares were issued illegally. Therefore, throughout the time periods pled in the FAC, Defendants Hahn and Clary directly, and indirectly:

> 1) employed a device, scheme or artifice to defraud (i.e. offered the sale and exchange of shares they knew were illegal);
>
> 2) made untrue statements of material fact and/or omitted to state material facts necessary to make the statements not misleading in the light of the circumstances under which they were made (i.e. failed to inform the EIN and subsequent Kokoweef shareholders that their shares were the subject of multiple securities violations); and
>
> 3) engaged in an act, practice or course of business which operated as a fraud or deceit upon the shareholders (devising a scheme to conceal securities violations from the shareholders until the statute of limitation had expired).

NRS 90.570. The language of Gelles clearly indicates that the transactions stemming from these deceptions constitute a purchase and/or sale pursuant to NRS 90.570. Specifically, Gelles, at 104, states:

> A transaction need not involve cash to constitute a purchase or sale. . . . The Supreme Court has held that the **simple exchange of shares in a merger qualifies as a purchase or sale when shareholders become shareholders in a new company" as a result of an "alleged deception [that] has affected shareholders' decisions in a way not at all unlike that involved in a typical case sale or share exchange.** Securities and Exchange Comm'n v. National Securities, Inc., 393 U.S. 453, 467, 89 S.Ct. 564, 572, 21 L. Ed.2d 668 (1969).

(Emphasis added).

Additionally, as described above, the allegations in the FAC related to the illegal sale of securities have already been admitted by Defendant Clary. See Exhibit 4. As such, neither Defendants' argument under Gelles, nor criticism of the factual allegations of the FAC are sufficient to warrant dismissal of Plaintiffs' FAC.

5. Plaintiffs Are Entitled to Injunctive Releif:

Defendants claim that Plaintiffs have no right to seek injunctive relief pursuant to the terms of NRS 90.640 because it only references the rights of the Administrator of the Securities Division of the Secretary of State's Office. However, a reading of the entire "Enforcement and Civil Liability" Chapter, i.e. NRS 90.615 - 90.700, indicates that neither enforcement, nor the types of available remedies are limited to the "Administrator".

First, NRS 90.670 contemplates actions by private parties by allowing a "person" to sue under NRS 90.660. Additionally, NRS 90.700(2) provides:

> The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist at law or in equity but this chapter does not create any claim for relief not specified in NRS 90.620 to 90.690, inclusive.

Various statutes and rules exist in Nevada law that provide Plaintiffs with rights for injunctive remedies. These include NRS 33.010 and NRCP 65. Accordingly, Plaintiffs are not proscribed from seeking injunctive relief, as claimed by Defendants.

6. Kokoweef Is Not a Necessary Party, and Defendants Request for Dismissal Is Improper:

Defendants inexplicably claim that the FAC must be dismissed for failure to name Kokoweef under the securities fraud causes of actions. Defendants have provided absolutely no credible legal authority for this argument. First, Defendants claim that only Kokoweef can be deemed an issuer pursuant to NRS 90.255, which circularly defines an issuer as a "person" who issues or proposes to issue a security. NRS 90.265 defines a "person" to include a government, governmental agency, or political subdivision of a government. However, it does not include a corporate entity in the definition, and a review of the rest of the chapter does not provide such a definition. Thus, Defendants' argument attempts to include a corporation under the definition of "person", and therefore, under the definition of "issuer". Defendants provide no other legal support to bolster its claim that only Kokoweef can be deemed an issuer.

Second, Defendants claim that without the inclusion of Kokoweef as a Defendant for violation of NRS 90.570, there can be no "complete adjudication", and the matter must be dismissed. Mot. 16:13-14. NRCP 19(a), which addresses "persons to be joined if feasible", simply does not contemplate dismissal of the FAC, as requested by Defendants.

Defendants have again utterly failed to provide credible support for these two novel legal arguments, and, therefore, the Court may disregard the argument in this section in their entirety. See EDCR 2.20; See Quillen v. State, 112 Nev. 1369, 1380 (1996); Citti v. State, 107 Nev. 89, 91 (1991).

7. Burke Is Not an Issuer of Securities and Therefore Cannot Be Liable to Plaintiffs:

Moving Defendants claim that Burke is a necessary Defendant in this derivative action because he was on the board of directors at the time some of the unregistered stock was sold. However, Burke was not the "seller" of the stock, and in fact confronted both Hahn and Clary about the legality of their actions. When he dared question them, he was wrongfully removed in violation of the Bylaws.

Additionally, given Defendant Hahn's literal dictatorship over Kokoweef, Burke is analogous to an "outside director", who does not have "the same duty or responsibility that falls upon those who are in active charge and who dictate day-to-day policy." Rowen, 282 N.W.2d at 652. "Outside directors should not take a position adversary to management. . . . [U]ntil they have reason to suspect impropriety, they may within reasonable limits rely on those who have primary responsibility for the corporate business. . . ." Id. at 653. In this case, the sale of unregistered stock went on without the knowledge of Plaintiff Burke. As soon as Plaintiff Burke realized that corporate by-laws were not being followed, he went to Defendants Hahn and Clary to request that Kokoweef come into compliance. In response to this demand, Defendants Hahn and Clary had Burke removed from the Board.

Regardless, even if Burke could be defined as a "seller", NRS 90.660, exempts those from liability those who did not know and in the exercise of reasonable care could not have known of the untrue statement or misleading omission. NRS 90.660(2)(b). In this case, the illegal issuance of the stock was known only to Defendants Hahn and Clary.

Counter-Motion to Strike Kokoweef's Joinder:

Kokoweef's joinder is legally improper and, therefore, must be stricken. As set out above, Kokoweef is a nominal defendant, who therefore, must remain neutral. Even filing the simple joinder to Hahn's dispositive motion violates this axiomatic principal. See Patrick v. Alacer, ___ Cal. Rptr 3d ____, 2008 WL 4649138 (Cal. App. 4 Dist.).

In Patrick v. Alacer, ___ Cal. Rptr. 3d ___, 2008 WL 4649138 (Cal. App. 4th Dist. Oct. 22, 2008), the corporate defendant filed a demurrer to a complaint by shareholders that the defendant directors had been looting the corporation, paying themselves bloated salaries, sold corporate assets below market value for personal gain, added friends and family to the payroll, rejected bona fide arms-length offers to purchase the company. Id. at 2. The underlying allegations in the Patrick case are similar to the allegations of mismanagement and corporate defalcation set out in the First Amended Complaint. In ruling on the demurrer, the court concluded that the coorporation had no ground to challenge the merits of a derivative claim filed on its behalf and from which it stands to benefit. Id. at 5.

This ruling is not unique to California or to this recent case. In fact, the Patrick court references numerous jurisdictions going back seventy-five (75) years that have reached the same conclusion. See, e.g., Swenson v. Thibaut, 250 S.E.2d 279, 293-94 (N.C. Ct. App. 1978); Sobba v. Elmen, 462 F. Supp. 2d 944, 947-50 (E.D. Ark. 2006); Rowen v. Le Mars Mut. Ins. Co. of Iowa, 282 N.W. 2d 639, 645 (Iowa 1979); Meyers v. Smith, 251 N.W. 20, 20-21 (Minn. 1933). Accordingly, Defendant Kokoweef's Joinder in the instant Motion is improper, and Plaintiffs request that this Court strike it from the record.

In Rowen, the court stated that the corporate nominal defendant "should take no active part in the controversy, merely awaiting the outcome and reaping the fruits of any judgment for plaintiffs." Rowen, 282 N.W.2d at 645. The Court was critical of the corporate nominal defendant's "aggressive part in the trial". Id. The same behavior has been undertaken by Kokoweef in this matter, i.e. improper and aggressive litigation against the Plaintiffs. As such, under the principals of these axiomatic cases, this Court should strike Kokoweef's joinder to the instant Motion to Dismiss.

CONCLUSION

Based on the foregoing, Defendants' Motion to Dismiss Plaintiffs' Verified First Amended Complaint should be denied in its entirety, and Nominal Defendant Kokoweef's Joinder stricken in its entirety.

DATED this 24th day of November, 2008.

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Details of filing titled:
Plaintiffs' Opposition to Defendants' M...
for Case Number A558629

Lead File Size:	3855447 bytes
Date Filed:	2008-11-24 16:50:29.0
Case Title:	A558629
Case Name:	A558629 - Burke Ted R vs. Hahn Larry L
Filing Title:	Plaintiffs' Opposition to Defendants' Motion to Dismiss
Filing Type:	EFO
Filer's Name:	Ann Scholz
Filer's Email:	ascholz@rvcdlaw.com
Account Name:	Ann Scholz Dap
Filing Code:	OPPS
Amount:	$ 6.00
Comments:	
Courtesy Copies:	
Firm Name:	Robertson & Vick
Your File Number:	5081.01
Status:	Accepted - (A)
Date Accepted:	2008-11-24 17:17:46.0
Review Comments:	
Reviewer:	Norreta Caldwell
File Stamped Copy:	A558629-370198_OPPS_Plaintiffs__Opposition_to_Defendants__Motion_to_Dismiss.pdf
Lead Document:	OPP TO MTN TO DISMIS.pdf 3855447 bytes
Data Reference ID:	
Account Information:	System Response: Approved Reference: EREE3A0107B8